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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Written statement* submitted by the International Commission of Jurists, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[13 February 2012]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

South asia: The role of national commissions of inquiry in investigating torture and other serious human rights violations

National Commissions of Inquiry (NCOIs) can contribute towards States' fulfilment of their international human rights obligations when established in line with international standards and best practices. However, as noted by the Special Rapporteur on extrajudicial, summary or arbitrary executions:¹

“All too often... commissions of inquiry are found wanting, and... are frequently designed to deflect criticism... rather than to address impunity.”

The International Commission of Jurists (ICJ) shares this observation in South Asia, where the use of NCOIs has contributed to a culture of impunity for serious human rights violations and to weakening of the rule of law. The ICJ welcomes the report of the Special Rapporteur on torture as a timely reminder of the international standards applicable to the use and operation of NCOIs.

Relationship between the criminal justice system and NCOIs

NCOIs are extraordinary, *ad hoc* mechanisms to be resorted to when the criminal justice system is incapable of responding to serious crimes and human rights violations. In such circumstances, NCOIs are typically tasked with fact-finding and advisory functions. Because they are not empowered to prosecute crimes, the role they play must be complementary to the criminal process, as highlighted by the Special Rapporteur in his report.

Where the regular system suffers from systemic weaknesses, emphasis should be on reform, rather than overlaying it with extraordinary measures such as an NCOI. “[A] commission of inquiry will not be able to overcome [on its own] the systemic impunity embedded institutionally in the criminal justice system”,² which in turn compromises the effectiveness of commissions created.

There is a worrying trend in Nepal of increasing reliance on ad hoc measures, rather than on the justice system, to investigate and resolve situations relating to serious human violations. Such normalising of the exceptional has led to entrenching impunity for human rights violations and attenuation of weak rule of law. For instance, although the Mallik Commission named more than 100 individuals as responsible for the deaths of 45 persons and injuries suffered by 23,000 others in 50 days of violence, the Attorney General declined to prosecute. He cited as reasons that the Commission had failed to provide adequate evidence; that even if there was sufficient evidence, prosecutions had to be initiated by district level officials; and that maintaining law and order was more important in the face of social disturbance as prosecuting police perpetrators would demoralise the police force. More recently, an NCOI was appointed to investigate – separately and in parallel to the criminal process – the abduction, transfer and subsequent murder of Ram Hari Shrestha. Although the Commission found four persons to be complicit in the death, the District Court charged five persons and sentenced only one to three years' imprisonment, because

¹ Special Rapporteur on extrajudicial, summary or arbitrary executions, Report to the General Assembly, UN Doc A/HRC/8/3, 2 May 2008, para 20.

² Kishali Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka: Rule of law, the criminal justice system and commissions of inquiry since 1977* (January 2010) p. 161.

the police were said to have been unable to locate the other four. In the only conviction, the accused was found guilty of being an accessory to murder, and proceedings on charges of abduction failed on grounds of double jeopardy.

In Sri Lanka, a review of NCOIs established between 1977 and 2006 highlighted the systemic and institutionalized impunity within the criminal justice system, and the ineffectiveness of NCOIs in ensuring accountability. Of nine commissions examined, few recommendations led to prosecutions and even fewer yielded convictions. For example, the Sansoni Commission only recommended that a few police officers be held accountable, and no State authorities were prosecuted for the deaths of the nine civilians.³ The Kokkadicholai Commission, which investigated 18 Sinhalese military officers for their alleged roles in the death of approximately 152 Tamil civilians in Batticaloa, recommended against civilian prosecutions. When the matter went before a military court, 17 of the 18 military officers were acquitted.⁴ In the NCOIs on enforced disappearances between 1994 and 1998, thousands of cases heard before the Commissions yielded a shockingly low number of prosecutions and even fewer convictions.⁵

The Nepali and Sri Lankan examples share weaknesses that compromise the effectiveness of NCOIs, one of which is the absence of specific offences in their penal codes. Although Nepal is a party to the Convention against Torture,⁶ torture has not been made a specific criminal offense as required under the Convention. NCOIs can never make a finding that torture has been committed and acts amounting to torture cannot be prosecuted as torture. Although torture is criminalised in Sri Lanka, the definition does not recognize mental or physical suffering thereby restricting what can be considered an act of torture.⁷

The lack of victim and witness protection laws is another weakness that affects NCOIs, as victims typically do not come forward, or those who do come forward later withdraw their complaints. Complainants, witnesses and their family members are threatened, intimidated and harassed for speaking out about crimes and human rights violations. In Sri Lanka, it is not uncommon for complainants to be arbitrarily detained after making a complaint and subjected to torture or other ill treatment.

Political will, and adherence to international standards

Where circumstances warrant the setting up of an NCOI, adherence to international standards and best practices⁸ – relating to the scope of the mandate, appointment of credible members, resources, transparency, publication of findings and recommendations – will be indicative of the requisite political will in addressing impunity for serious human rights violations.

It is unsurprising that most of the NCOIs established in Sri Lanka have not contributed towards truth, justice or reparations for victims. It is not uncommon for commissioners to have a conflict of interest with the mandate for which they have been appointed; for commissions' terms of reference to be temporally and substantively limited; and for

³ Above note 2, pp. 61-66.

⁴ Above note 2, pp. 97-98.

⁵ Above note 2, pp. 99-102.

⁶ Nepal acceded to the Convention against Torture on 14 May 1991.

⁷ See the corresponding recommendation of the Committee against Torture following its examination of the combined third and fourth periodic report to the Committee, UN Doc CAT/C/LKA/CO/3-4 (2011), para 25.

⁸ For example, the Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

recommendations to go unpublished. In 2006, the Udalagama Commission was criticized for its limited mandate and for the apparent conflict of interest of one of its Commissioners. The Commission was wound up prematurely in 2009 and its findings were never published. The most recent Lessons Learned Reconciliation Commission (LLRC), while problematic in many respects, offers a degree of promise. The Commission acknowledged that civilians were attacked during the last days of the war; recommended that findings in the Udalagama Commission and previous NCOIs be implemented; called on the Government to consider a crime of enforced disappearance; and recommended the Police be de-linked from the Department of National Defense. The LLRC nevertheless failed to adequately address allegations of international humanitarian and human rights law violations, including those deemed credible by the UN Panel of Experts on Accountability in Sri Lanka.

In Nepal, the findings of the Rayamajhi Commission set up after the April 2006 People's Movement was submitted to the Government, but not made public. The then-Prime Minister promised full implementation of the report, and set up yet another body, the Oli Commission, to take action against those named responsible for the violence in the report. The Oli Commission refused to follow through with the findings of the Rayamajhi Commission, claiming that it did not provide appropriate recommendations. No one has been held accountable for the 22 dead and more than 5,000 wounded from the protests. Given the context and the reasons for which NCOIs are established in Nepal – the most high profile commissions were appointed following episodes of violent socio-political change – the seeds for their failure are often sown even before the commissions begin work. They are used primarily as a means to diffuse heightened political tensions, and there is little political will to see that the findings and recommendations, when made available, are duly implemented.

Call for action

The ICJ urges the Human Rights Council to call on the Governments of Nepal and Sri Lanka to extend their cooperation, including invitations to undertake official missions, to the Special Rapporteur on torture and other mandate holders, including the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Working Group on Enforced and Involuntary Disappearances and the newly established Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

The ICJ encourages the Special Rapporteur on torture, together with other relevant mandate holders such as the Special Rapporteur on extra-judicial, arbitrary or summary executions, to call upon the Governments of Nepal and Sri Lanka to publicly commit to the principles set out in the Special Rapporteur's report prior to the establishment of NCOIs investigating serious human rights violations.